THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Presiding Court Judge

Case No. 2013-CP-26-5009

K N S Foundation, LLC, d/b/a Elite ..... *Appellant,*

v.

The City of Myrtle Beach ..... *Respondent.*

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

I. PROCEDURAL IRREGULARITIES

This case involves the revocation of three (3) business licenses by the Respondent, City of Myrtle Beach ("Myrtle Beach"), issued to the Appellant, KNS Foundation, LLC d/b/a Elite ("KNS"). A hearing was held by the Myrtle Beach City Council on June 25, 2013. During the hearing, both Myrtle Beach and KNS presented testimony and exhibits. KNS brings to the Court's attention that Myrtle Beach failed to file the original record within thirty (30) days with the Horry County Clerk of Court, as is required by Rule 75, SCRCP. KNS's counsel presented to the Circuit Court some, but not all, of the transcript of the hearing that took place before the Myrtle Beach City Council, together with some, but not all, of the exhibits that were introduced at the hearing. (R. pp. 38-52; R. pp. 244-261) Myrtle Beach filed a Response to Appeal, and, in it filed an Objection to Exhibits (R. p. 36) objecting to the exhibits KNS attached to its Appeal, except for the Order of City Council. Myrtle Beach, in its Objection, stated that the Clerk of the City of Myrtle Beach would provide the record for the appeal pursuant to the South Carolina Rules of Civil Procedure.

As the original record on appeal was not filed with the Horry County Clerk of Court, the only exhibits from the hearing that would have been before the Circuit Court before it rendered its decision were those provided by KNS's counsel. Throughout this Brief, KNS will reference the transcript of the hearing as well as some of the exhibits that were introduced, but these references to the transcript are being made conditionally, since they were not formally before the Circuit Court and

cannot now be properly included in the Record on Appeal to this Court pursuant to Rule 210(c), SCACR.[1]

II. HISTORY OF THE PROCEEDINGS

As noted above, this case arises out of the revocation of KNS's three business licenses by Myrtle Beach. KNS had applied for and been issued three business licenses for an "eating place", "drinking place" and "pool hall/arcade". The three business licenses were issued on April 5, 2013. KNS operated continuously from that date until June 10, 2013, when Myrtle Beach issued its Notice of Business License Suspension. (R. p. 237)

The business license inspector for Myrtle Beach suspended KNS's three business licenses on June 10, 2013, alleging that ". . . the business licenses appear to have been obtained through misrepresentation, fraud or deception." She claimed that the establishment was allegedly being operated as a nightclub/lounge. (R. p. 237) On June 14, 2013, KNS obtained a temporary restraining order allowing it to stay open pending the revocation hearing before the Myrtle Beach City Council. (R. p. 1)

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[1] The irregularity with respect to the transcript and exhibits came to light when KNS's counsel was preparing the Designation of Matter. When KNS's counsel reviewed the file at the Horry County Clerk of Court's office, it was discovered that it did not contain the transcript or the exhibits. By way of further explanation, KNS's counsel would show the transcript of the hearing before the Myrtle Beach City Council was filed in a related matter, K&S [sic] Foundation, LLC v. City of Myrtle Beach, being 2013-CP-26-4103. However, the filing date of the transcript shows that it was filed on December 10, 2013, well after the Circuit Court affirmed the revocation of the three (3) business licenses by Myrtle Beach.

Myrtle Beach, through its City Council, conducted a hearing on June 25, 2013, and, on July 9, voted 3-2 to revoke KNS's three (3) licenses. Its Order for Suspension of Business License was issued on July 11, 2013.[2] (R. p. 3)

KNS timely appealed to the Court of Common Pleas. On September 13, 2013, the Circuit Court entered a form order (R. p. 14) affirming Myrtle Beach's Order for Suspension of Business License, which was followed by the Circuit Court's written order on September 20, 2013. (R. p. 20) The Circuit Court's Order simply recited that sufficient evidence existed to support the decision by Myrtle Beach to revoke KNS's three business licenses. The Circuit Court's Order did not address the specific issues raised in KNS's appeal nor did it discuss the evidence which supported Myrtle Beach's decision for revocation.[3] KNS filed its motion to reconsider on October 11, 2013 (R. pp. 60-67), which was denied by Order entered November 6, 2013, and received by KNS on November 8, 2013. (R. pp. 17-18)

This timely appeal was filed on December 2, 2013 (R. p. 74) and amended on December 10, 2013 to correct technical errors. (R. p. 81).

STATEMENT OF THE FACTS

KNS was operated by Brooke Kennedy and her husband, Javon Kennedy. They intended to open a sophisticated billiard/pool hall, which they have referred to

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[2] The title of the Order is "Order for Suspension of Business Licenses" but the Order, itself, revokes the business licenses.

[3] It has been determined that the transcript of the hearing before the Myrtle Beach City Council and the exhibits submitted were not filed with the Horry County Clerk of Court by Myrtle Beach. The only documents presented to the Circuit Court were those offered by KNS's counsel.

in advertising as Elite Ultra Lounge. On March 27, 2013, KNS submitted three business license applications to operate under the trade name "Elite", as a drinking place, eating place, and a pool hall/arcade located at 641 Robert M. Grissom Parkway, in Myrtle Beach, South Carolina. Previously, other businesses operated in this same location as billiard/pool rooms serving food and alcoholic beverages, most recently a club known as "Red". (R. p. 91)

At the request of Myrtle Beach, KNS agreed to certain changes, though none was required by the City business license ordinance. Among these changes were increased security, an increase from the three pool tables, as operated by the previous owner, Red, to eight pool tables, and an agreement not to charge a cover charge. (R. pp. 102, 152, 184, 240) Complying with each of the changes required a substantial investment by KNS; and by agreeing to no cover charge, foregoing income by KNS.

Before issuing the licenses, McDowell saw that the floor plan was similar to Red's floor plan, including the same DJ booth for playing music. (R. pp. 99, 100, 102) Ken May, the Myrtle Beach Zoning Administrator, inspected the premises before it opened and reported "... that [KNS] had moved in a total of eight (8) pool tables and moved out tables and chairs. Ken stated there was no dance floor and the interior of the business looked like a pool hall." (R. p. 240)

The zoning ordinance for the area allowed a wide variety of uses, including those for which the business licenses were issued, but did not include primary use as a "night club," which Myrtle Beach Ordinance § 204.82 defines as '[a] restaurant, dining room, or similar establishment where a dance floor of 150 square feet or more

is provided for guests.' There is no documentation, but McDowell testified that she told KNS the location is not zoned for use as a night club.

The business licenses were issued on or about April 5, 2013. KNS operated for the next two months without any charge or allegation that it had violated any business license, zoning, or any other ordinances.[4]

Then, on June 10, 2013, KNS suddenly received from McDowell, by certified mail, a Notice of Business License Suspension and proposed revocation for all three business licenses. The letter said in principal part:

> The reason for the immediate suspension and proposed revocation of the business licenses for Elite is that it has been determined from police reports that the business licenses appear to have been obtained through misrepresentation, fraud, or deception which are grounds for revocation of a business license under § 11-35 (3). The business licenses were issued for a pool hall/arcade that serves food and alcohol when the business has been observed by Myrtle Beach Police Officers to be operating as a nightclub/lounge. [Emphasis added.] (R. p. 237)

Apart from one sentence in the Notice of Business License Suspension saying that officers observed the business as operating as a night club/lounge and that the business was being marketed as Elite Ultra Lounge, most of the remainder of the grounds for suspension was an extensive discussion as to the allocation of gross receipts as to the pool hall, food and beverages, with the concluding ground for suspension/revocation apparently being that "the primary business is coming from

[4] On May 23, 2013, there was a shooting in the parking lot after certain individuals were denied entrance into the premises by KNS's security. Officer Stephanie James confirmed that KNS cooperated with the investigation and provided information as to the possible identity of the shooters. (R. p. 166)

the sale of alcohol and not billiards." (R. p. 237) Notwithstanding McDowell's analysis on the source of revenue into KNS, there is nothing in the business license ordinance which defines the amount of revenue allowed under one permit as compared to the other permits. The business licenses and the applications did not specify any of the uses as primary, secondary, etc.

McDowell's Notice of Business License Suspension had apparently been prompted by a May 31, 2013 request from Warren Gall, Chief of Police, who asked her to conduct an investigation because, "Based on my personal observations, and observations made and reported by members of the Myrtle Beach Police Department, this business *appears* to be operating as a night club or club". (Emphasis added.) (R. p. 6) There is no indication that she undertook an investigation other than looking at gross receipt data and a Facebook page.

The suspension took effect immediately. KNS, in a separate action, filed an action seeking injunctive relief. A temporary restraining order was entered on June 14, 2013, allowing KNS to continue to operate for ten (10) days. (R. pp. 1-2) Again, no investigation took place during this period.

The revocation hearing took place before the Myrtle Beach City Council on June 25, 2013. Myrtle Beach presented its case first and the chief witnesses for Myrtle Beach were license inspector McDowell, Zoning Administrator Kenneth May, Myrtle Beach's Chief of Police, Warren Gall, and four other police officers. Before dealing with their testimony, it should be noted that no police or incident reports were introduced at the hearing.

More notably, not one witness ever testified observing the operations and use of Elite on any date before Memorial Day weekend, May 25-27, 2013. That was a significant date because Memorial Day weekend in Myrtle Beach is annually the occasion of "Black Bike Week." That predominantly-black festival is an exceptionally crowded time in Myrtle Beach (just like the predominantly-white Harley Week that precedes it in mid-May), and conditions are uniquely crowded in a way unlike any other time.

The testimony presented by Myrtle Beach to establish that KNS had obtained its licenses by fraud consisted of the following:

McDowell: She began her efforts at the request of Chief Gall. (R. p. 95) She did not go to the location, but viewed KNS's Facebook page (R. p. 96) She also reviewed a police report of Officer Stephanie James. (R. p. 96) (Although that police report was not presented at the hearing, Officer James did testify, and her testimony showed that KNS was in complete compliance when she observed it.) McDowell also did a comparison of KNS's gross receipts from different activities.[5] She testified that the Facebook page told her that she had been deceived: "I mean, I see a pool table, but I don't see people actively shooting pool." (R. pp. 95-96) From this she believed she had been deceived and believed KNS had always intended to operate as a night club, although there is no evidence of this. McDowell also

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[5] One of her concerns was that only 17% of the income was coming from pool, but even if that had been relevant, she was mistaken as to the figure, which represented only the amount received by KNS after the pool table supplier took his 50% charge. The gross revenue from pool was actually 28% of the total receipts, but half the pool table income went to the supplier of the pool tables. (R. p. 174-176)

testified that at the beginning of Black Biker's Weekend, Brooke Kennedy called McDowell and asked her if the agreement not to charge a cover charge could be changed so as to allow a cover charge during that weekend. (R. p. 94-95)

Police Officer Mike Gavrilis: After the shooting (on May 23, 2013), police began making visits to the location, including walk-throughs. On one occasion, he saw pool tables moved aside and an open space about two pool tables long and two pool tables wide. (R. p. 117) Although his specific testimony tied this observation to "on one particular walk-through," he later expanded his count to having seen the open space on three occasions out of seven walk-throughs (R. p. 123), and later to "three or four" times. (R. p. 124) In response to a leading question, he said it looked like a night club to him, with no indication of what he thought a night club looked like. He wrote nothing up and made no reports.

Police Officer Shannon Castle: He saw a podium (the DJ area, which was a permissible use) several times, which he later amended to "five," (R. p. 134) and said it looked like a night club, again with no indication of what distinguishes a night club from anything else. He emphasized that everything was orderly, with people just having a good time. (R. p. 137)

Police Officer David Clever: Officer Clever testified that he saw a dance floor and heard an employee say the dance floor was crowded. (R. p. 139)

Police Chief Warren Gall: Chief Gall testified that the police visits started after the shooting on May 23, 2013 (R. p. 144), and on May 26, 2013, he and another officer went in and saw pool tables pushed aside and a podium [the DJ booth] and a dance floor with one person dancing. (R. p. 146) He spoke to someone about the

license (without specifying who he spoke to or what was said). (R. p. 146) He also saw food vendors outside, without permits, so he told them to leave and they did. (R. p. 149) He did not testify to ever going back to see if there was still a dance floor after Black Bike Week, and did not testify to any other investigations about KNS's licenses after this one visit. He also did not testify to ever speaking to the Zoning Administrator or anyone else about any zoning question. Instead, his first and only action was to write to the License Administrator, McDowell, asking for an investigation of the circumstances surrounding the issuance of original licenses.

Police Officer Stephani James: Officer James testified that she investigated the shooting and received full cooperation from KNS, and was there twice in the daytime with pool tables in normal position. (R. p. 167-168) It was this officer to whom McDowell had referred and said she had read Officer James's report. (R. p. 96)

Zoning Administrator Kenneth May: Mr. May testified that he deals with zoning not business license operations procedures. (R. p. 151) The zoning code does not authorize night clubs in the zoning district where KNS was located. (R. p. 151) However, nothing in the zoning code prohibits dancing in a pool hall. (R. p. 153; 162-163) The zoning code is silent as to bar cover charges. In addition, Mr. May explained that a zoning violation is dealt with by a notice of violation and efforts to gain compliance. (R. p. 163-164) Mr. May never cited KNS for a zoning code violation or gave it the opportunity to come into compliance if there was a violation.

On July 9, 2013, three members of City Council (not a majority) voted to revoke the three business licenses on grounds of fraud, misrepresentation or false or

misleading statement, evasion or suppression of a material fact in the license application (without specifying which one it was), and two voted against revocation.

A written order for Suspension of Business Licenses ("Order") was prepared.[6] The Order gave no standard of evidence and said nothing about the evidence being "clear and convincing" or any other level of burden of proof.

The Order made several findings. It found that KNS, in obtaining the business licenses, had represented that the premises would be used for serving food and alcohol and playing pool, and knew that a "nightclub" is not among the uses permitted in that zoning district. (R. p. 4) The Order then found that the premises had been used as a nightclub, basing this finding on: (1) the establishment "held itself out to the public through social media such as Facebook as Elite Ultra Lounge offering "Arts/Entertainment/Nightlife" and "advertising entertainment events, drink specials and other activities associated with a nightclub," (R. p. 5), and (2) "on several visits the police officers noticed that Elite's pool tables were often pushed away from their normal locations against the outer walls of Elite . . . and a dance floor of 150 square feet or larger was provided for Elite's patrons. The police observed DJs who played loud music for patrons who danced." (R. p. 5)

Although the Order used words like "on several visits" and "pool tables were often pushed away," there were no citations to any specific date or dates of these "observations" and no written documentation of any of them. Nevertheless, the Order concluded that ". . . and the activities of KNS in operating Elite throughout its

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[6] Indeed, only one member of the three-person plurality signed the Order.

existence proved that KNS obtained its business license through a fraud ..." (Emphasis added.) (R. p. 5)

KNS sought review in the Court of Common Pleas. The Circuit Court made no reference to the proof requirements in a fraud case, but said it was bound to uphold the revocation-for-fraud finding because there was "evidence sufficient to support the finding of City Council that Elite's business licenses were obtained by Elite through a fraud." (R. p. 11) Put another way, the Circuit Court held that Myrtle Beach's only obligation is to avoid a decision which is "arbitrary, unreasonable, or an obvious abuse of its discretion." A motion to reconsider, which reiterated several claims the lower court had not addressed in its initial order, was denied. (R. pp. 17-18)

This appeal followed.

STANDARD OF REVIEW

The judiciary traditionally defines the standard of proof for an administrative hearing when the legislature has not. Anonymous v. State Board of Medical Examiners, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998). Absent an allegation of fraud, the standard of proof in an administrative hearing is generally a preponderance of the evidence. Id. If fraud is alleged, as in this case, the standard of proof is clear and convincing evidence.

As to the findings of the city council, such findings of an administrative body will not be disturbed unless it is without evidentiary support in light of the proper standard of proof, or it is against the clear preponderance of the evidence. Gay v.

City of Beaufort, 364 S.C. 252, 254, 612 S.E.2d 467, 468 (Ct. App.2005).

Myrtle Beach had the burden of proof of proving the alleged violations that would support the revocation of the business licences. 51 Am. Jur. 2d *Licenses and Permits*, § 78.

ARGUMENT

McDowell, in her Notice of Business License Suspension, made clear that she was immediately suspending and then moving to revoke KNS's business licenses because they had "... been obtained through misrepresentation, fraud, or deception, which are grounds for revocation of a business license under Section 11-35 (3)". (R. p. 237) City Council sustained the suspension and revoked KNS's business licenses finding:

> The owner of Elite falsely represented to McDowell and Ken May, Zoning Administrator for the City of Myrtle Beach, that the premises would not be used for a night club. The owner of Elite represented to McDowell that the premises would be used primarily as a pool hall/arcade, with secondary uses being serving alcohol and food. Those uses are permitted in a C-3 Commercial Zoning District and reliance on those false representations, the City's Zoning Administrator approved zoning compliance and Respondent issued 3 three business licenses to Elite. (R. p. 4)

As McDowell told City Council that the percentage of gross revenue attributable to pool was not a deciding factor in her decision (R. pp. 114-115), the sole issue, therefore, is whether Myrtle Beach presented sufficient evidence to establish that KNS acted fraudulently or deceitfully in obtaining its three business licenses.

KNS will show that Circuit Court erred in not requiring Myrtle Beach to prove that KNS acted fraudulently and deceitfully by a clear and convincing standard of proof. As importantly, KNS will show that Myrtle Beach failed to present sufficient evidence to sustain a finding of fraud and deceit.

I. THE LACK OF A RECORD AND THUS THE LACK OF EVIDENCE RENDERS THE CIRCUIT COURT'S DECISION A NULLITY.

Rule 75, SCRCP, makes clear that "[a]ppeals to the circuit court shall be made upon the original record in the lower court or administrative agency or tribunal" and the clerk of the inferior tribunal (Clerk of the City of Myrtle Beach) has the duty to submit the original record to the circuit court within thirty (30) days. KNS provided some of the record to the Circuit Court, but Myrtle Beach objected, stating that it would provide the original record to the Circuit Court. (R. p. 36) Myrtle Beach did not comply with Rule 75, and the Circuit Court did not have the complete original record before it when it rendered its decision.

The unusual circumstance in this case wherein the Circuit Court did not have the full record before it, made it impossible for the Circuit Court to review Myrtle Beach's action, to ascertain whether there was sufficient evidence to support Myrtle Beach's revocation or whether there was any evidence to sustain Myrtle Beach's revocation of the three licenses. By analogy, when an appeal is taken from a grant of summary judgment "[i]t is [the appellate court's] duty to undertake a thorough and meaningful review of the trial court's order and the entire record on appeal." Owen v. Lee Process Systems Co., 342 S.C. 232, 235, 536 S.E.2d 86, 88 (Ct. App. 2000).

KNS, under these circumstances, deserves no less a review than would have been given to it if this were an appeal from grant of summary judgment.

Under these circumstances, the Circuit Court had no basis for its decision and its order should not stand. Sustaining an official action without evidence to support it is a fundamental denial of due process in violation of the South Carolina Constitution and the Constitution of the United States. See Thompson v. Louisville, 362 U.S. 199, 80 S. Ct. 624, 4 L.Ed.2d 654 (1960).

II. THE CIRCUIT COURT ERRED IN NOT REQUIRING A HEIGHTENED STANDARD OF PROOF, SUCH AS "CLEAR AND CONVINCING PROOF," FOR REVOCATION OF A LICENSE BASED ON A CHARGE OF FRAUD.

Myrtle Beach accused KNS of fraud and revoked its license to do business on that ground. An accusation of fraud is a serious matter, recognized by all courts as imposing a more stringent burden of proof on the party asserting fraud. Typically, that higher standard of proof is a requirement of "clear and convincing" proof. Our Supreme Court has made clear that heightened burdens of proof come only in limited circumstances, but one of those circumstances is fraud. Anonymous, supra., 329 S.C. at 371, 496 S.E.2d at 17. In Anonymous, our Supreme Court said "[a]bsent an allegation of fraud", the ordinary standard of proof for administrative hearings is preponderance of the evidence. Id. at 375, S.E.2d at 19. In that case, the Supreme Court noted that other jurisdictions require a clear and convincing standard when fraud is alleged, citing In re D'Angelo, 105 N.M. 391, 733 P.2d 360 (1986). Anonymous, supra, 329 S.C. at 322, 496 S.E.3d at 20, n.4.[7]

[7] The language found in In re D'Angelo is identical to the language found in Anonymous id.

The reason is obvious, because fraud has consequences that go beyond merely losing a license, privilege or other opportunity. Its consequences follow and affect all aspects of a person's life. For the same reason, our courts require that allegations of fraud, even in ordinary civil cases between private litigants, must meet heightened proof requirements.

> There are two reasons for this strict standard. First, the nature of the wrongdoing involved and the law presumes that people act with good faith and honesty rather than fraudulently. Second, fraud is often alleged in challenging such things as a written contract, a deed, or a judicial decree. Policies underlying the validity of these things require that a person challenging them bear a heavy burden of proof. F. P. Hubbard & R. L. Felix, The South Carolina Law of Torts 386 (4th ed., 2011).

To label a business as fraudulent and then to revoke its business licenses should require the party asserting the charge of fraud to bear a heavy burden of proof.

The requirement is all the more important when dealing with a lay body as the adjudicator. It is all too simple for lay people to rush to judgment when not required to meet clear and convincing standards of evidence. Nor will this hamper administrative bodies, because there are many other basis for declining to issue or renew licenses that do not require heightened proof for fraud. For example, repeated violations of a zoning law or repeated and consistent operation beyond the terms of a business license do not require heightened proof. However, the care built into those determinations comes from the usual rules that there should be an opportunity to come into compliance, and that the conduct must be repeated and flagrant, as well as knowing.

To be sure, revocation of a business license is not necessarily in the same category as revocation of a professional license to practice medicine or law, but the consequences of a fraud allegation are analogous, in tending to cripple the licensee's ability to earn a living.

There may be other ways than a "clear and convincing proof" requirement to create evidentiary protection where an administrative revocation is based on or accompanied by a grave allegation of fraud, but in any event, such an allegation cannot be upheld without some requirement of careful review of the administrative revocation on grounds of fraud.

III. MEASURED BY ANY STANDARD OF PROOF, THERE WAS INSUFFICIENT EVIDENCE, OR NO SUBSTANTIAL EVIDENCE, TO SUPPORT THE CITY'S FINDING THAT KNS HAD SECURED ITS LICENSES BY FRAUD.

The evidence in the case shows, at most, several violations of a zoning ordinance, on a unique weekend, well after KNS had been in operation for two months. There is no evidence of any violation of any ordinance, much less a violation of any condition of the business licenses, at any time before the Memorial Day Weekend.

In fact, the central finding on which the City's Order rested, as to the KNS operation "throughout its existence," are completely devoid of evidentiary support because the only evidence of its operation concerned several days beginning no earlier than May 23, 2013. That was when the walk-throughs began, according to the Chief of Police and another officer. No officer testified to anything about KNS before that date.

Nevertheless, Myrtle Beach found that the KNS applicants had lied to the business license administrator. That conclusion appears to have been based partly on the source of revenues – even though nothing in the ordinances speaks to that and even though the revenues were in roughly equal parts from the three activities – and language in the Facebook advertisements. That language used words like "nightlife" and "entertainment," both of which are recognized aspects of billiards arcades, restaurants, bars, and other night time establishments. Indeed, KNS had an additional license allowing it to serve alcohol late at night.

It is true that fraud can be proved by circumstantial evidence, e.g., Cook v. Metro. Ins. Co., 198 S.C. 77, 194 S.E. 636, (1938); Continental Jewelry Co. v. Kerhulas, 136 S.C. 496, 134 S.E. 505 (1926). Care, however, must be taken to restrict the inferences to be drawn from circumstances to those that truly give rise to the serious finding of fraud. Especially here, where later acts are read back to serve as proof of an original fraudulent intent, many cases have rejected such an attempted connection.

In Bailey v. Alabama, 219 U.S. 219, 31 S. Ct. 145, 55 L.Ed. 191 (1911), Alabama had a statute making a breach of a farm labor contract prima facie evidence of a fraudulent intent at the time of the making of the contract. The Supreme Court of the United States held this was impermissible.

Similarly, in South Carolina, a mere breach of a contract will not support a claim for fraud. Dailey Co. Inc. v. American Institute of Marketing Systems, Inc., 256 S.C. 550, 183 S.E.2d 444 (1951). More importantly, Myrtle Beach cannot rely on the issuance of the business licenses as an element of fraud because it was

required to issue the licenses. See M.B. Kahn Const. Co. Inc. v. S.C. Nat'l. Bank of Charleston, 225 S.C. 381, 384, 271 S.E.2d 414, 415 (1980) ("We hold that one cannot recover for a fraudulent misrepresentation which induces him to perform an act he was legally obligated to perform"). The business licenses were properly issued based on the applications submitted by KNS. This was acknowledged by Ken May, the Zoning Administrator recognizing that KNS had moved in a total of eight pool tables, having moved out tables and chairs, and that there was no dance floor space and it looked like a pool hall to him. (R. 240) That there may have been a subsequent zoning code violation concerning the use of the business (which is denied), this cannot be converted into a claim that KNS had made fraudulent misrepresentations when it obtained its business licenses.

Not one Myrtle Beach employee or agent ever reported any violation on the part of KNS before Black Bike Week; not one Myrtle Beach employee or agent who claimed to see a violation ever wrote it up or said anything to anyone at KNS. When the Chief visited and claimed to see a violation, he did speak to someone "about the license," but did not say what he said, nor do any further investigation or check on any possible zoning violation. He immediately requested an investigation of the license issuance. That investigation never occurred, by him or anyone else, unless a glance at a Facebook page containing inconclusive words counts, or unless a glance at the irrelevant issues of gross revenues constitutes an investigation worth of revoking KNS's business licenses.

The only specific incident the Chief of Police ever described was his instruction to vendors that they should leave because they had no permits. They

promptly left. KNS had agreed not to charge a cover charge. When they wanted to start charging one, they asked if they could. Hardly the sign of a willful violator, much less the sign of an intent to defraud two months earlier. Several police witnesses cited wholly permissible uses – such as the DJ playing music from a booth or podium – as part of what they thought "looked like" a night club.

All in all, the City's attempt to manufacture a finding of fraud in March 2013, based on possible sporadic violation of a vague ordinance two months later, is not supported by substantial evidence. If the evidence here supports a finding of fraud at the outset, anyone can be found guilty of fraud based on little or no evidence.

Other courts have held that sporadic violations of a business license code or zoning code should not result in the extremely harsh result of the loss of a business license. In Burley v. City of Annapolis, 182 Md. 307, 34 A.2d 603 (1943), the Maryland Court of Appeals held that the City of Annapolis could not revoke a business license issued to operate two pool tables just because the business owner had pled guilty to operating a gambling house on the premises. Id. at 308-309, 34 A.2d at 603-04. At the request of the Annapolis Chief of Police, the municipal authorities revoked the business license for the pool tables. Annapolis argued that it had the right to revoke the business license because the gambling activity constituted a nuisance. Id. at 312, 34 A.2d at 605.

On appeal, the Maryland Court of Appeals reversed, ruling that "[o]ne conviction does not make the premises a gambling house and a nuisance per se" noting that a nuisance necessarily involves the idea of continuing activity. Id. at 313, 34 A.2d at 605. The Maryland Court of Appeals summarized its position as follows:

> Our conclusion must be that the action of the appellee in revoking the appellant's billiard license was arbitrary and unwarranted. It cannot be upheld under the terms of the license ordinance, nor can it be held that, by such action, the city was abating or forbidding a public nuisance. In so holding, we are not weakening the police power of the city. That power is the force behind the maxim sic utere tuo ut alienum non laedas. It is one of the most comprehensive powers, if not the most comprehensive power, outside of the war power, which any government may have. It extends to the protection of health, morals, safety, and general welfare of the public, and all means which may be necessary in the opinion of the authorities to give such protection. Yet it is not without its limitations, and one of these is that it cannot be exercised arbitrarily. In this case, arbitrary action was taken under the guise of the police power in a manner not authorized by such power. It cannot be upheld.

The revocation of a business license, based on a sporadic violation, constitutes an arbitrary and unreasonable action.

The evidence, in the light most favorable to Myrtle Beach, shows that during the Black Biker Weekend, the pool tables may have been moved which allowed patrons of Elite to dance. The only evidence shows that this happened only during this one weekend. Additionally, the Facebook pages allowed McDowell to speculate as to what they may be advertising. These bits of evidence are clearly insufficient to uphold a charge that KNS made fraudulent misrepresentations when it applied for its business licenses. But there is nothing that shows that they advertised either a night club or dancing. Revocation of KNS's business licenses, after the expenditures it made into the business, is both arbitrary and unreasonable under the circumstances of this case.

CONCLUSION

The City of Myrtle Beach's decision to revoke KNS business licenses on grounds that they had been obtained buy fraud was not supported by substantial evidence, or any evidence, and was arbitrary and unreasonable. The Circuit Court's decision to uphold the license revocation was based on no evidence of record, and the Court did not have the full record before it to review before finding that the evidence was sufficient. Accordingly, the judgment below should be reversed.

Respectfully submitted,

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The undersigned certified that the Final Reply Brief complies with Rule 211(b), SCACR.

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September 3, 2014

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge
Trial Court Case No.: 2013-CP-26-04103

Appellate Case No. 2013-002793

K N S Foundation, LLC d/b/a Elite ..... Appellant

v.

City of Myrtle Beach ..... Respondent

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I certify that I have served a copy of the Appellant's FINAL BRIEF and FINAL REPLY BRIEF by depositing a copy of it in the U.S. Mail on September 4, 2014, addressed to the attorneys of record:

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